2005

Tammy Bluemel v. State of Utah : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

TAMMY BLUEMEL, Appellant, v. STATE OF UTAH, Appellee.	Appellate Court Case No. 2005-0208

BRIEF OF THE APPELLANT

Appeal from a Memorandum Decision, granting Appellee's Motion to Dismiss Appellant's Petition for Post-conviction Relief, in the Fourth Judicial District, in and for Utah County, State of Utah, the Honorable James R. Taylor presiding. Appellant is currently incarcerated at the Utah State Prison.

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IN THE UTAH COURT OF APPEALS

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BRIEF OF THE APPELLANT

JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. §78-2a-3(2)(j).

ISSUES, STANDARD OF REVIEW, PRESERVATION

Issue: The trial court erred in failing to address the merits of Appellant's Petition for Post-Conviction Relief and in denying it on the basis that it was untimely because the untimely filing is subject to the interest of justice exception.

Standard of Review: The Court reviews an appeal from an order dismissing a petition for post-conviction relief "for correctness without deference to the lower court's conclusions of law." *Gardner v. Galetka*, 2004 UT 42, ¶ 7, 94 P.3d 263; *Rudolph v.*

Galetka, 2002 UT 7, ¶ 4, 43 P.3d 467.

Preservation: Appellant is now appealing the memorandum decision of the trial court which determined that Appellant's untimely filing of her Petition for Post-Conviction Relief should not be waived due to the interests of justice.

Sub Issue A: The trial court erred in determining that Appellant's entry of an unknowing and involuntary plea was insufficient grounds to waive the untimely filing in the interests of justice and to require vacation of Appellant's convictions.

Standard of Review: The Court reviews a denial of a petition for post-conviction relief "for correctness without deference to the lower court's conclusions of law." *Gardner v. Galetka*, 2004 UT 42, ¶ 7, 94 P.3d 263; *Rudolph v. Galetka*, 2002 UT 7, ¶ 4, 43 P.3d 467.

Preservation: Appellant is now appealing the trial court's decision that, even if Appellant entered an unknowing and involuntary plea, such was insufficient to waive the untimely filing in the interests of justice and require vacation of her convictions.

Sub Issue B: The trial court erred in determining that Appellant's ineffective assistance of counsel was insufficient to warrant waiving the untimely filing of her Petition in the interests of justice and a reversal of her convictions.

Standard of Review: The Court reviews a denial of a petition for post-conviction relief "for correctness without deference to the lower court's conclusions of

law." *Gardner v. Galetka*, 2004 UT 42, ¶ 7, 94 P.3d 263; *Rudolph v. Galetka*, 2002 UT 7, ¶ 4, 43 P.3d 467.

Preservation: Appellant is now appealing the trial court's memorandum decision which found that even if Appellant received ineffective assistance of counsel, it was insufficient to warrant waiving the untimely filing of the petition or to warrant vacating her convictions.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Sixth Amendment to the United States Constitution

Article 1, section 12 of the Utah Constitution

Utah Code Annotated, §78-2a-3

Utah Code Annotated, §78-35a-102

Utah Code Annotated, §78-35a-104

Utah Code Annotated, §78-35a-107

Utah Rules of Civil Procedure, Rule 65B

Utah Rules of Criminal Procedure, Rule 11

STATEMENT OF THE CASE

On October 4, 2001, Appellant, Tammy Bluemel ("Ms. Bluemel"), was charged with seven counts of Rape, a First Degree Felony, and one count of Supplying Alcohol to a Minor, a Class A Misdemeanor. (Criminal Case No. 011404069 Record 4 (hereinafter "Crim. R.")). She was represented at the trial court level by Victor Lawrence. (Crim. R. 9, 20). Mr. Lawrence has never withdrawn from representing Ms. Bluemel. On December 5, 2001, Ms. Bluemel entered guilty pleas to three counts of rape, and one count of supplying alcohol to a minor, while the remaining four counts of rape were dismissed. (Crim R. 29-31). She was sentenced on March 27, 2002, and received three indeterminate terms of not less than five years and which may be life, and one indeterminate term not to exceed one year, all to be run concurrently. (Crim. R. 44-45). Ms. Bluemel's counsel did not file a notice of appeal nor did he file a Petition for Post-Conviction Relief. On May 3, 2004, through new counsel, Ms. Bluemel filed a Petition for Post Conviction Relief and Supporting Memorandum, alleging that she entered an involuntary and unknowing plea, and had received ineffective assistance of counsel. (Civil Case No. 040401880 Record 6-8, 17 (hereinafter "Civil R.")). Upon request for decision from Ms. Bluemel, the trial court reviewed the petition and found that it merited a response from the government; the trial court thus ordered a copy of the petition served upon the Attorney General. (Civil R. 23). The government, Appellee, filed a Motion to

Dismiss the Petition, and supporting memorandum on November 4, 2004. (Civil R. 35-86). Ms. Bluemel then filed a Memorandum in Opposition to the Motion to Dismiss on January 31, 2005. (Civil R. 116-126). The government filed a Notice to Submit for Decision on February 7, 2005, and the trial court issued its memorandum decision on February 10, 2005. (Civil R. 128-133). In its decision, the trial court granted Appellee's Motion to Dismiss the Petition as untimely, finding that neither of Ms. Bluemel's claims warranted a waiving of the untimely filing. (Civil R. 131-133). Ms. Bluemel then filed a Notice of Appeal on February 25, 2005. (Civil R. 135).

STATEMENT OF FACTS

On October 4, 2001, Ms. Bluemel was charged with seven counts of rape and one count of supplying alcohol to a minor. (Crim. R. 4). On October 24, 2001, attorney Victor Lawrence ("Mr. Lawrence" or "trial counsel") entered an appearance on Ms. Bluemel's behalf. (Crim. R. 20). On December 5, 2001, Ms. Bluemel entered guilty pleas to three counts of rape and one count of supplying alcohol to a minor, while the other four counts of rape were dismissed. (Crim. R. 22-29).

When Ms. Bluemel entered her pleas, she was under the influence of eight prescription drugs:

1. 300 mg of Neurontin three times daily (1800 mg daily);
2. 150 mg of Effexor twice daily (300 mg daily);

3. 5 mg of Xanax daily;

4. 50 mg of Trazadone daily;

5. 700 mg of Soma four times daily (2800 mg daily);

6. 800 mg of Ibuprofen daily (2400 mg daily);

7. Macrodantin; and

8. Axid.

(Civil R. 121).

Prior to accepting her pleas, the trial court informed Ms. Bluemel of the maximum possible punishments, most of the rights which she was waiving by entering a guilty plea, and that she would have thirty days in which to move to withdraw her plea. (Crim. R. 57:2-4). Significantly, the trial court judge did not inquire as to whether she was under the influence of any drugs or alcohol, nor as to whether she was knowingly and voluntarily entering her pleas. (Crim. R. 57). She was also not informed by the trial court that she was presumed innocent, could compel witnesses to testify on her behalf, or that her right of appeal was limited. (Crim. R. 57). The trial court asked for the factual basis of the plea, and the terms of the plea agreement. (Crim. R. 57:2, 4). Ms. Bluemel then entered her pleas, which the trial court accepted as knowing and voluntary. (Crim. R. 57:4-5). Ms. Bluemel was sentenced on March 27, 2002, and received three indeterminate terms of not less than five years and which may be life, and one indeterminate term not to exceed one

year, all to be run concurrently. (Crim. R. 44-45). She was taken into custody at that time and remains at the Utah State Prison. (Crim. R. 44).

Immediately following her sentencing, Ms. Bluemel told Mr. Lawrence that she wanted to appeal. (Civil R. 113). He advised her that he would handle it, and that she had one year in which to file an appeal. (Civil R. 113). During Ms. Bluemel's first year in prison, Mr. Lawrence visited Ms. Bluemel approximately three (3) times, although not during her first thirty days in prison, and each time he informed her that he was working on the appeal. (Civil R. 113). Ms. Bluemel continued to write and call Mr. Lawrence, however, his office eventually refused her calls and would not answer her letters. (Civil R. 112-113). After one year, Ms. Bluemel stopped trying to contact her attorney, and began seeking new counsel. (Civil R. 113). Ms. Bluemel hired current defense counsel in October of 2003 to research her options. After meeting with Ms. Bluemel, reviewing the evidence, and researching the law, defense counsel filed a Petition for Post-Conviction Relief on May 3, 2004. (Civil R. 17, 19, 112, 124). The government moved to Dismiss the Petition, and after a response from Ms. Bluemel, the trial court granted the government's Motion to Dismiss, finding that there were insufficient interests of justice such to waive the untimely filing of the Petition. (Civil R. 36-86, 99-126, 130-133). This appeal follows.

SUMMARY OF ARGUMENT

The trial court erred in determining that the interests of justice did not warrant

waiving the untimely filing of Appellant's Petition for Post-Conviction Relief. Rather, because Appellant did not enter a knowing and voluntary plea, and was afforded ineffective assistance of counsel throughout and following the trial court proceedings, the interests of justice require waiving the one year time period, and warrant post-conviction relief for Appellant.

ARGUMENT

THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S PETITION FOR POST-CONVICTION RELIEF BY FINDING THAT THE INTERESTS OF JUSTICE DID NOT WARRANT WAIVING THE UNTIMELY FILING, AND IN FAILING TO REACH THE MERITS OF THE PETITION TO FIND THAT VACATION OF APPELLANT'S CONVICTIONS IS WARRANTED.

Pursuant to the Post Conviction Remedies Act ("Act"), a defendant may petition for post-conviction relief, such as a vacation or modification of an original conviction or sentence, on such grounds that "the conviction was obtained ... in violation of the United States Constitution... [or] the Utah Constitution ...[or] the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution[.]" Utah Code. Ann. § 78-35a-104. The Act was meant to be a "substantive legal remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies[.]" U.C.A. §78-35a-102. In assessing whether a final conviction should be reviewed, a judgment is usually final and not subject to attack, except in unusual circumstances. *Jackson v. Friel*, 2004 UT App

155 (citing *Carter v. Galetka*, 2001 UT 96, ¶15, 44 P.3d 626). Unusual circumstances are demonstrated by showing that "there was an obvious injustice or a substantial and prejudicial denial of a constitutional right." *Id.* When an obvious injustice or denial of constitutional rights has occurred, a post-conviction petition may be used to attack the judgment of conviction. *Gomm v. Cook*, 754 P.2d 1226, 1227 (Utah Ct. App. 1988).

Pursuant to the statute, such a petition for post-conviction relief must be filed within one year after the cause of action has accrued. U.C.A. § 78-35a-107. A cause of action accrues on the latest of the following dates:

> (a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;
> (b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;
> (c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;
> (d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed; or
> (e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based.

U.C.A. § 78-35a-107(2). However, an untimely filing may be excused if the court finds that "the interests of justice require." U.C.A. §78-35a-107(3). While Utah courts have declined to provide a specific definition of "interests of justice," several cases have addressed whether sufficient interests of justice require waiving an untimely filing.

In *Julian v. State*, an inmate filed for extraordinary relief pursuant to Rule 65B of

the Utah Rules of Civil Procedure, alleging that the trial court erred in admitting hearsay testimony without first assessing its reliability, and that both trial and appellate counsel were ineffective. 966 P.2d 249 (Utah 1998). The State argued that the untimely filing should bar review of the petition, and that the "interests of justice" exception was to be applied narrowly in only truly exceptional circumstances. *Id.* at 254. The State further argued that the statute of limitations under Section 78-35a-107 meant to encourage litigants to research and bring their claims early to promote finality, and that the State had an interest in keeping convicted persons incarcerated, and late claims made it "difficult, if not impossible, ...to defend against those claims." *Id.* While the Court appreciated the State's arguments, it was not persuaded, stating that "if the proper showing is made [that the petitioner has been wrongfully incarcerated], the mere passage of time can *never* justify continued imprisonment of one who has been deprived of fundamental rights, regardless of how difficult it may be for the State to reprosecute that individual." *Id.* (emphasis in original). The Court went on to say that "meritorious claims raised in a habeas corpus petition will *always* be in the interests of justice." *Id.* The Court then found that the trial court acted within its discretion in concluding that the interests of justice - the gravity of petitioner's claims - excused his untimely filing. *Id.* at 258. While this case dealt with a petition for habeas corpus, the Court specifically addressed the one-year filing deadline in the Post Conviction Remedies Act.

Additionally, in *Currier v. Holden,* the Court excused an untimely filing where the defendant was moved to a rural jail and had trouble meeting with attorneys. 862 P.2d 1357, 1359 (Utah Ct. App. 1993). In *McClellan v. Holden*, the Court excused an untimely filing where the defendant had two attorneys withdraw from his case, had difficulty contacting a new attorney, and the trial transcript was misplaced. 862 P.2d 1357, 1359-60 (Utah Ct. App. 1993). Conversely, a five-year delay and lack of evidence justifying a waiver did not excuse an untimely filing in *Oliver v. State*, 2004 UT App 360 (unpublished decision). Also, the Court found no reason to excuse the untimely filing where a defendant simply dumped the facts of the case on the court with no research or legal argument, *Baird v. Galetka*, 2003 UT App 250 (unpub. memo. decision), or where the defendant's claims were frivolous and had already been raised and rejected, *Reddish v. Galetka*, 2000 UT App 328 (unpub. memo. decision).

Other states, in looking at the "interests of justice" exception to a time deadline, have discussed several factors that may be considered in a court's decision. In *State v. Goodwin*, the New Jersey Supreme Court was faced with the untimely filing of a petition for post-conviction relief. 803 A.2d 102 (N.J. 2002). The New Jersey post-conviction relief statute states that a "court may relax the time bar if the defendant alleges facts demonstrating that the delay was due to the defendant's excusable neglect or if the 'interests of justice' demand it." *Id.* at 109. There, the Court stated that in determining

whether a defendant had put forth sufficient evidence to relax the time bar in the interests of justice, the court should "consider the extent and cause of the delay, the prejudice to the State, and the importance of the petitioner's claims[.]" *Id.* After applying these factors however, the petition was found to be time-barred because the defendant failed to adequately explain the nearly three-year delay in filing. *Id.* at 113.

In this case, Appellant readily admits that her Petition was untimely filed. She was sentenced on March 27, 2002, and had thirty days - until April 26, 2002 - to appeal or move to withdraw her pleas. Although she repeatedly expressed the desire to do so to her counsel, neither was done. Accordingly, her cause of action accrued April 26, 2002, and she had until April 26, 2003 to file a petition for post-conviction relief. Appellant's Petition was not filed until May 3, 2004, one year and seven days after the deadline. The cause for most of this delay was trial counsel's continued representations to his client that he was taking care of her case when in fact he was not doing anything with the case. Once Appellant finally figured out she was not receiving assistance, the deadline for filing her petition had passed. She then was faced with the task of retaining new counsel while incarcerated, much like the defendant in *McClellan*. It is notable that during this entire period, Appellant was incarcerated at the Utah State Prison. It goes without saying that an inmate's ability to locate, retain, and meet with counsel is significantly more difficult than one who is not incarcerated. While it is true that Appellant did not seek

counsel for a period of time, this failure was based on her trial counsel's repeated representations that he was actively working on her appeal. (Civil R. 112-113). In hindsight, Appellant perhaps should not have accepted counsel's representations, but it is precisely because a lay person does not understand the law that he or she retains counsel. Given the lack of prejudice to the State, it would be fundamentally unfair to visit the sins of the lawyer on the client.

Additionally, any prejudice to the State is minimal, if present at all. The State argued that "[c]ollateral attacks on legitimate convictions many years later make it difficult, if not impossible, for the State to defend against those claims. Witnesses may have moved, died, or otherwise forgotten the events in questions. Important evidence or records may have also been destroyed." (Civil R. 78). Additionally, in its Order granting the State's Motion to Dismiss, the trial court noted that the victim could be harmed by reopening the case. (Civil R. 132). Specifically, the trial court noted that the "emotional trauma of the crime can often be more significant than the physical impact" and that "[a]llowing a tardy challenge which could result in the prosecution beginning anew can create tremendous hardship and difficulty for all witnesses." (Civil R. 132).

Appellant concedes that victims need not be drug through numerous court proceedings if unnecessary, but Appellant contends that the victim in this case will not be further emotionally scarred by granting her Petition. As the first case ended in a plea, the

victim has never been forced to testify. Further, the victim in this case was not a young child who could be traumatized merely by new court proceedings, but rather a male adolescent who has by now reached the age of majority. (Crim. R. 57:4).

While the State does have a legitimate interest in limiting challenges to convictions, this interest cannot and does not trump a defendant's interest in having his constitutional rights protected. This argument has been rejected outright by the Utah Supreme Court. *See Julian*, 966 P.2d at 254 ("[T]he mere passage of time can *never* justify continued imprisonment of one who has been deprived of fundamental rights, regardless of how difficult it may be for the State to reprosecute that individual.") (emphasis in original). Further, the one-year delay in filing should not be prejudicial to the State because the State should still have the file and any evidence, including statements from the victim that prompted the plea initially, and no showing has been made that any witnesses have died or moved, or that the events underscoring this case would easily be forgotten. Thus, although the State would be forced to reprosecute the case, it is not unduly prejudicial to require it to do such when constitutional rights were clearly violated.

Finally, and most importantly under *Goodwin*, there has been a significant injustice to Appellant which requires that the time limits be relaxed. As discussed in greater depth below, Appellant was denied her constitutional right to effective counsel, and her plea

was not knowingly and voluntarily entered, as required by both the United States and Utah Constitutions, and the Utah Rules of Criminal Procedure. Denial of these two basic rights is clearly an injustice and make Appellant's claims of vital importance.

Accordingly, Appellant's untimely filing should be excused in the interests of justice. Here, there are two grounds that warrant both excusing the untimely filing in the interests of justice and granting post-conviction relief: a) Appellant's entry of an involuntary and unknowing plea, and b) the ineffective assistance of trial counsel.

A. Appellant's Involuntary and Unknowing Plea Warrants Both Waiving the Untimely Filing of Her Petition, as Well as Post-conviction Relief.

A defendant may petition for relief by challenging a conviction on the grounds that it was obtained in violation of the United States or Utah Constitutions. Utah Code Ann. §78-35a-104. Further, the "interests of justice" allowing waiver of an untimely filing exist where constitutional rights have been violated. *See Bevill v. State*, 669 So.2d 14, 17 (Miss. 1996)(five-year time limit on filing for post-conviction relief could be waived by proving a violation of fundamental constitutional rights); *Goodwin*, 803 A.2d at 109-10 (five-year time limit could be waived if the interests of justice demand; a claim of ineffective assistance of counsel could be sufficient to trigger the interests of justice exception). The Constitution requires that a guilty plea be knowingly and voluntarily entered. *State v. Benvenuto*, 1999 UT 60, ¶ 11, 983 P.2d 556; *State v. Stilling*, 856 P.2d

666, 670-71 (Utah Ct. App. 1993). When the plea is not knowingly and voluntarily entered, the defendant's due process rights have been violated, and the plea is unconstitutional. *Id.*; *McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 1170, 22 L.Ed.2d 418 (1969).

Rule 11 of the Utah Rules of Criminal Procedure requires that before a court may accept a guilty plea, it must find several things, including that a plea is voluntary, and that a defendant has been fully advised of all the constitutional rights he waives by entering a guilty plea. Utah R. Crim. P. 11. If a defendant is uninformed as to the rights he is waiving, a plea cannot be knowing and voluntary. *State v. Ostler*, 2000 UT App 28, ¶ 12, 996 P.2d 1065 (aff'd 2001 UT 68, 31 P.3d 528)(citing *State v. Breckenridge*, 688 P.2d 440, 444 (Utah 1983)). Because Appellant's plea was neither taken after a full and complete Rule 11 colloquy, or knowingly and voluntarily entered, her constitutional rights were violated, and the interests of justice require waiving the untimely filing of her Petition. Additionally, these constitutional violations require that post-conviction relief be granted to Appellant.

1. The Trial Court Failed to Strictly Comply With Rule 11, Making Appellant's Guilty Plea Involuntary, Unknowing and Unconstitutional; thus Warranting Excusing Appellant's Untimely Filing in the Interests of Justice and Granting Post-conviction Relief.

Before a court can accept a guilty plea from a defendant, the court must first find

several things, including that the plea was voluntary, the defendant knows the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, these rights are waived; that the defendant understands the nature and elements of the offense to which the plea is entered, that if a trial occurred that the prosecution would have the burden of proving each element beyond a reasonable doubt, that the plea is an admission of all those elements, that there is a factual basis for the plea, that the defendant knows the minimum and maximum possible sentences, the details of the plea agreement, that the defendant has been advised of the time limits for filing a motion to withdraw the plea, and that the defendant knows the right of appeal is limited. Utah R. Crim. P. 11(e). Rule 11 must be strictly complied with, and the trial court has the burden of "personally establish[ing] that the defendant's guilty plea is truly knowing and voluntary and establish[ing] on the record that the defendant knowingly waived his or her constitutional rights." *State v. Corwell*, 2005 UT 28, ¶ 11. This burden is one of "strict compliance." *Id.* (citing *State v. Visser*, 2000 UT 88, ¶ 11, 22 P.3d 1242); *Ostler*, 2000 UT App at ¶ 11 (Sixth Amendment right to counsel embodied in Rule 11); *State v. Gibbons*, 740 P.2d 1309, 1312 (Utah 1987)(requirement protects a defendant's right to due process); *Stilling*, 856 P.2d at 671 ("the procedural rules are

meant, to some extent at least, to incorporate constitutional protections")(citing *United States v. Newman*, 912 F.2d 1119 (9th Cir. 1990) and *Salazar v. Utah State Prison*, 852 P.2d 988 (Utah 1993)). Strict compliance with Rule 11(e) creates a presumption that the plea was voluntarily entered. *State v. Gamblin*, 2000 UT 44, ¶ 11, 1 P.3d 1108.

Strict compliance however, does not require the court to read a specific script, but rather only to establish that each requirement of the rule is satisfied. *Corwell*, 2005 UT at ¶ 12. Further, a court can satisfy the requirements of the Rule by either questioning the defendant on the record or by establishing that a written statement or plea affidavit reciting these factors has been read, understood and acknowledged by the defendant. *Id.*; Utah R. Crim. P. 11(e); *State v. Maguire*, 830 P.2d 216, 217 (Utah 1991). That is, the plea affidavit must be incorporated into the record. *State v. Dean*, 2004 UT 63, ¶ 10, 95 P.3d 276 (plea affidavits or plea statements are "properly used and incorporated into the record when the trial court determines that the defendant has read the affidavit or statement, understands its contents, and acknowledges those contents."). If a court has not established on the record that the defendant has read, understood and acknowledged the affidavit, the affidavit is not incorporated into the record, and cannot be used in determining whether Rule 11 was strictly complied with. *State v. Mora*, 2003 UT App 117, ¶¶ 19-20, 69 P.3d 838.

The burden of establishing compliance with the requirements of Rule 11 is placed

squarely on the trial court. *Benvenuto*, 1999 UT at ¶ 11. It is insufficient for the court to merely assume that defense counsel has ensured that the defendant fully understands the contents of a plea affidavit. *Gibbons*, 740 P.2d 1309. Rather, the trial court must *personally* establish that the defendant's plea is truly knowing and voluntary. *State v. Thurman*, 911 P.2d 371 (Utah 1996). Further, in establishing that a plea is knowing and voluntary, general questions are insufficient, rather the court should make a specific inquiry. *State v. Valencia*, 776 P.2d 1332 (Utah Ct. App. 1989). Because a plea cannot be voluntary if it is uninformed, the defendant must be notified of *all* the rights he is waiving. *Ostler*, 2000 UT App at ¶ 12 (citing *Breckenridge*, 688 P.2d at 444). The reason for this strict compliance and absolute necessity of a finding that the plea was knowing and voluntary is to ensure that defendants know their rights and understand the basic consequences of their decision to plead guilty. *Visser*, 2000 UT at ¶ 11. These rights are so important that they "demand the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." *Gibbons*, 740 P.2d at 1312 (citing *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969)).

In *State v. Mora*, the trial court did not inform the defendant during the plea colloquy that if he went to trial the state would bear the burden of proving all elements beyond a reasonable doubt. 2003 UT App at ¶ 10. The plea affidavit did contain this

information. *Id.* at ¶ 12. Following the colloquy, the trial court asked the defendant whether he was satisfied with his counsel's representation and if he had any questions, to which the defendant responded he was satisfied and had no questions. *Id.* at ¶ 11. The trial court then witnessed as the defendant signed the plea affidavit. *Id.* On appeal after his motion to withdraw his plea was denied, the defendant argued that his plea was unknowing and involuntary, and the court found that the plea affidavit had not been properly incorporated into the record because the trial court did not inquire as to whether the defendant had read, understood, and acknowledged the plea affidavit. *Id.* at ¶ 20. Without the plea affidavit, the colloquy did not strictly comply with Rule 11 as the defendant was not apprized of his right to have the state prove him guilty beyond a reasonable doubt. *Id.* at ¶ 21. The State argued that the error was harmless, however, the court stated that it would "presume harm ... when a trial court fails to inform a defendant of his constitutional rights under rule 11." *Id.* at ¶ 22. When a defendant does not know which rights he is waiving, he cannot make a fully informed decision, the plea cannot be voluntary, and harm is presumed. *Mora*, 2003 UT App at ¶ 22. Accordingly, the conviction was vacated and the defendant allowed to withdraw his plea. *Id.* at ¶ 23.

In *State v. Ostler*, the defendant pled guilty to several misdemeanor charges, and then moved to withdraw his pleas. 2000 UT App 28. When this motion was denied as untimely, he appealed. *Id.* at ¶ 5. In reviewing whether the trial court "strictly complied

with constitutional and procedural requirements for entry of a guilty plea," the Court of Appeals noted that although the defendant had viewed the video which generally explained a defendant's rights, the trial court had engaged in defendant in a plea colloquy in which he explained only one of the seven requirements under Rule 11. *Id.* at ¶ 3, 6, 11. That the defendant understood his rights as explained in the video was never established on the record, and therefore, the record failed to establish that the defendant was fully informed of his rights. *Id.* at ¶ 20. Because the defendant did not know of these rights, by definition his plea could not be knowing and voluntary, and the trial court erred in accepting it. *Id.* at ¶ 12, 23, 25. The convictions were thus vacated, and the case remanded. *Id.* at ¶ 27.

Additionally, in *Corwell*, the Court of Appeals vacated the conviction of a defendant whose plea was accepted in violation of Rule 11. 2003 UT App 261. There, the trial court failed to inform the defendant that she was waiving her right to a speedy trial and that she was limiting her right of appeal. *Id.* at ¶15, 17. The State argued that the trial court had substantially complied with Rule 11, and thus the plea was properly accepted. *Id.* at ¶ 19. However, the appellate court reiterated that the test is not *substantial* compliance, but rather *strict* compliance, and the omissions thus required reversal as the defendant was not informed of her constitutional rights. *Id.* Accordingly, the plea was erroneously accepted, the motion to withdraw the plea should have been

granted, and the convictions were vacated. *Id.* at ¶ 20.

In this case, the plea affidavit was not properly incorporated into the record, and absent its contents, the trial court did not strictly comply with the requirements of Rule 11. During the plea hearing, although the trial court cursorily addressed the plea affidavit, there was no showing on the record that Appellant had read, understood, and acknowledged the plea affidavit. Rather, the trial court told Appellant that her rights were talked about in the plea affidavit, and asked if Appellant had "any questions about the statement [in advance of plea]". (Crim. R. 57:3:9-11). Appellant responded that she did not, and the trial court later noted that Appellant had signed the statement. (Crim. R. 57:3, 4). However, nothing more was said about the plea affidavit. It was never established on the record that Appellant had read the affidavit, had its contents explained to her by trial counsel, or that she understood everything it contained. There is no evidence in the record that Appellant read, understood, and acknowledged the plea affidavit, and therefore it was not properly incorporated into the record, and cannot be used in determining whether Rule 11 was strictly complied with.

Absent the plea affidavit, Appellant was not fully advised of all her rights as required by Rule 11. Specifically, Appellant was never advised of the presumption of innocence, that she had the right to compel the attendance of her own witnesses at trial, or that her right of appeal was limited, as required by Rule 11(e)(3) and (8). (Crim. R. 57).

Although the trial court complied with the rest of the Rule's requirements, and omitted only these three, the Rule requires *strict* compliance, and an assurance on the record that the defendant was apprized of *all* the rights she was waiving by entering her plea. *Corwell*, 2005 UT at ¶ 11. Substantial compliance is simply insufficient. *Id.*; *Valencia*, 776 P.2d 1332 . Appellant was not advised to three distinct constitutional rights she was waiving by entering her plea, and accordingly, Rule 11 was not strictly complied with. Thus, her plea could not be and was not knowingly and voluntarily entered, and should never have been accepted by the trial court. Accordingly, it should now be vacated.

However, although failure to strictly comply with Rule 11 invalidates a guilty plea and requires allowing the defendant to withdraw that plea, in order to obtain post-conviction relief, a defendant must show "more than a violation of the prophylactic provisions of rule 11; he ... must show that the guilty plea was in fact not knowing and voluntary." *Salazar*, 852 P.2d at 992. Accordingly, Appellant must also show that her guilty plea was actually unknowingly and involuntarily entered. Because Appellant can make this showing - that her plea was actually involuntary and unknowing *in addition to* several violations of Rule 11 - Appellant's untimely filing should be excused and post-conviction relief granted.

2. *Appellant's Plea Was Not Knowingly and Voluntarily Entered as She Was Under the Influence of Multiple Prescription Medications That Prevented Her from Understanding the Proceedings.*

The Constitution requires that a guilty plea be knowingly and voluntarily entered. *Benvenuto*, 1999 UT at ¶ 11; *Stilling*, 856 P.2d at 670-71. When the plea is not knowingly and voluntarily entered, the defendant's due process rights have been violated, and the plea is unconstitutional. *Id.*; *McCarthy*, 394 U.S. at 466. To enter a voluntary and knowing plea, a defendant must be competent, which means the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him." *State v. Holland*, 921 P.2d 430, 433 (Utah 1996)(internal quotations omitted)(quoting *Godinez v. Moran*, 509 U.S. 389, 396, 113 S.Ct. 2680, 2685 (1993)). A plea is not knowing and voluntary if it is the product of ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats, or if the defendant is incompetent or "otherwise not in control of [his] mental facilities." *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993)(quoting *Boykin*, 395 U.S. at 242-43 and *Brown v. Perini*, 718 F.2d 784, 788 (6th Cir. 1983)). A defendant's competency to enter a valid plea can be detrimentally affected by medications, which can cause a defendant to be unable to enter a knowing and voluntary plea. *Godinez*, 509 U.S. at 394 n.3, 396 n.6, 398-99.

Courts have oftentimes found a defendant incapable of entering a knowing and

voluntary plea when suffering from certain mental conditions or under the influence of medication, alcohol, or drugs. In *Holland*, the defendant was found incompetent to enter a plea when suffering from mental conditions, including depression. 921 P.2d at 434; *see also State v. Romers*, 766 P.2d 623, 628 (Ariz. Ct. App. 1988)(defendant incompetent to enter knowing and voluntary plea when suffering from severe depression); *Gomm*, 754 P.2d 1226 (defendant's arguments that his plea was involuntary and unknowing because he entered it while suffering from a mental illness, and while under the influence of several prescription medications which he had taken in excess of their dosage, warranted evidentiary hearing on the issue); *Wells v. Shulsen*, 747 P.2d 1043 (Utah 1987) (evidentiary hearing warranted by defendant's arguments that his plea was involuntary and unknowing because he was under the influence of medication when the plea was entered). Because a defendant may be under the influence of something which affects his ability to enter a knowing and voluntary plea, courts often directly ask the defendant or his counsel whether he is capable of entering a knowing and voluntary plea. *State v. Beckstead*, 2004 UT App 338, ¶ 10, 100 P.3d 267 (court is not ordinarily required to inquire *beyond* a defendant's denial of drug or alcohol use, but such a duty to make additional inquiries may arise if the court becomes aware that the defendant may be impaired); *State v. Penman*, 964 P.2d 1157 (Utah Ct. App. 1998)(meaningful plea colloquy when the trial court verified with the defendant that he could read, write and

understand English, was not under the influence of drugs or alcohol, was not mentally ill, understood the constitutional rights he was waiving by pleading guilty, understood the penalties, and was satisfied with his attorney's advice.); *State v. Cameron*, 704 P.2d 1355, 1358 (Ariz. Ct. App. 1985)(trial court could not judge a defendant's competency to waive a jury based solely on the colloquy in which the defendant merely answered "yes" or "no" to questions posed by the trial court); *Holland*, 921 P.2d at 435 (same).

In *United States v. Damon*, the defendant informed the trial court during the plea colloquy that he was under the influence of prescription medication, but the trial court failed to further question the defendant about the medication or its effects upon the defendant. 191 F.3d 561 (4th Cir. 1999). Instead, the court accepted the guilty pleas, and the defendant appealed, arguing that the trial court had a duty to "follow up on the drug ingestion issue in order to determine whether he was competent to plead." *Id.* at 564. The appeals court agreed, finding that the court should have broadened its inquiry to satisfy itself that the plea was being made knowingly and voluntarily. *Id.* at 565. The trial court erred in failing to conduct a further inquiry into the defendant's mental state as a result of his medication use, and the case was remanded for a determination of whether the medication taken by the defendant, based on objective data about its nature and effect, had the capability to sufficiently affect the defendant's mental faculties such to render him incompetent to enter a guilty plea. *Id.* The trial court had a clear obligation to ensure that

a defendant's drug use did not effect his ability to enter a voluntary and knowing plea. *Id.; see also United States v. Cole*, 813 F.2d 43, 46-47 (3d. Cir. 1987)(where court is informed that the defendant has recently ingested drugs or other substances capable of impairing his ability to make a knowing and voluntary waiver of his constitutional rights, the court has an obligation to inquire further into the defendant's competence); *United States v. Parra-Ibanez,* 936 F.2d 588, 595-96 (1st Cir. 1991)(the court had reason to suspect that the medications taken by the accused might impinge upon the defendant's capacity to enter a voluntary and intelligent plea, but failed to inquire what dosages the defendant had taken and what effects, if any, the medications would have on the defendant's clear-headedness); *Godinez*, 509 U.S. at 416-17 (Blackmun, J., dissenting) (recognizing that medication can affect one's mental competence and once trial court was aware of defendant's prescription drug use, it should have conducted a further inquiry into his competence to waive his constitutional rights).

Conversely, in *Benvenuto*, the court found that a defendant had entered a knowing and voluntary plea where, upon inquiry, both the defendant and his counsel informed the court that there were no competency issues. 1999 UT 60. There, the defendant was charged with aggravated murder, attempted aggravated murder and two counts of aggravated robbery, but was offered a plea in which the aggravated robbery counts were dismissed. *Id.* Upon his arrest, he was placed on suicide watch at the county jail, and was

appointed several attorneys who had extensive experience representing clients who had mental health problems or whose competence to enter a plea was questionable. *Id.* at ¶ 3-4. Defense counsel inquired into defendant's competence, and the defendant was interviewed and examined by a forensic psychologist and a forensic psychiatrist. *Id.* at ¶5. These examiners found the defendant to be depressed, but capable of entering a knowing and voluntary plea. *Id.* At the plea hearing, the court conducted a Rule 11 colloquy, and asked defense counsel if the defendant was offering a voluntary and knowing plea. *Id.* at ¶7. Defense counsel disclosed that the defendant had some mental health issues, but was an intelligent young man and was capable of understanding the proceedings. *Id.* The court then asked the defendant if he was being treated for any medical or mental conditions, to which the defendant answered he was not. *Id.* at ¶ 8. The defendant later moved to withdraw his plea on the grounds that he was confused and depressed when he entered it, and therefore the plea was not truly voluntary. *Id.* at ¶ 9, 12. The trial court denied the motion, and the defendant appealed. *Id.* at ¶ 9. On review, the Utah Supreme Court affirmed the district court's rulings, finding that the defendant's attorneys had been "scrupulously attentive to [his] mental condition" and had reasonably inquired into his mental state by having him examined by mental health professionals, and conveyed their knowledge of his competency at the hearing. *Id.* at ¶ 14, 19-20. Further, the defendant's own actions, demeanor, and statements at the plea supported a finding of

a voluntary plea. *Id.* at ¶ 21. The Supreme Court then affirmed the trial court ruling, holding that the plea was entered knowingly and voluntarily. *Id.* at ¶ 23.

Similarly, in *State v. Manning*, the defendant petitioned for post-conviction relief, claiming her right to appeal had been denied. 2004 UT App 87, 89 P.3d 196, *cert. granted*, 98 P.3d 1177 (Utah 2004). In reviewing her claim, the court found that at the plea hearing, the defendant entered knowing and voluntary pleas and knowingly and voluntarily waived her rights, referencing defense counsel's assertions that defendant was a "bright lady" who was educated through the 15th grade, and that she had participated in preparing her written plea statement. *Id.* at ¶ 4. Further, the defendant spoke directly to the court, stating that defense counsel had adequately and properly served her, and she was satisfied with his service. *Id.* Because the defendant was adequately informed of her rights, and it was later shown that she did not request that an appeal be filed, her petition was denied. *Id.* at ¶ 29, 33-35.

In this case, it is clear that Appellant was not capable of entering knowing and voluntary pleas because of her medicated and impaired mental state at the plea hearing. At the time Appellant entered her plea, she was under a doctor's care and was taking the following prescription medications for a litany of maladies:

- 300 mg of Neurontin three times daily (1800 mg daily)
- 150 mg of Effexor twice daily (300 mg daily)
- 5 mg of Xanax daily
- 50 mg of Trazadone daily

- 700 mg of Soma four times daily (2800 mg daily)
- 800 mg of Ibuprofen three times daily (2400 mg daily)
- Macrodantin; and
- Axid.

(Civil R. 113-114, 121). The purpose of these medications was as follows: Neurontin for mood stabilization, Effexor for depression, Xanax for panic attacks, Trazadone as a sleeping aid, Ibuprofen for menstrual cramping, Macrodantin for post-intercourse pain and to prevent urinary tract infections, Axid for ulcers and heartburn, and Soma for muscle tension and migraine prevention. (Civil R. 113). As testified to in the affidavit of pharmacology and toxicology professor Doug E. Rollins, this culmination of medications at the indicated dosages would likely cause a significant decrease in Appellant's cognitive functioning, and her cognitive abilities would be significantly impaired. (Civil R. 109-110). This combination of medications severely limited Appellant's ability to consult with her trial counsel with a reasonable degree of rational understanding, and to understand the proceedings, and thus rendered her unable to enter a knowing and voluntary plea.

Further, the court did nothing to discern whether Appellant was able to enter a knowing and voluntary plea. Beyond the omissions in the Rule 11 plea colloquy, the trial court never inquired from either Appellant or trial counsel as to whether Appellant was under the influence of anything, had any mental or emotional conditions affecting her mental capacity, or was capable of entering a knowing and voluntary plea. Unlike the trial

courts in *Beckstead* and *Penman* who undertook to adequately ensure that the defendant could enter a knowing and voluntary plea, this trial court did nothing of the sort. Rather, like the trial courts in *Holland* and *Cameron* that were reversed and remanded, the trial court attempted to judge Appellant's competency and ability to enter a valid plea based merely on a few cursory responses of "yes" and "no". The trial court's failure to inquire failed to uncover that Appellant was under the influence of multiple prescription medications that adversely impaired her mental state and made her unable to enter a knowing and voluntary plea. Undoubtedly, had Judge Burningham been warned that Ms. Bluemel was on eight prescription medications at the time, including psychotropic mood stabilizing drugs, he would not have accepted her plea without further inquiry. *See Benvenuto*, 1999 UT 60.

Additionally, the review of the video shows that Appellant did not appear capable of entering a knowing and voluntary plea. During the entire proceeding, Appellant is shown to be distracted and fidgety. (Civil R. 146). She repeatedly shifts her gaze around the courtroom and doesn't appear able to focus solely on the judge. *Id.* Her demeanor is clearly inconsistent with that of a defendant who is entering a plea to three first degree felony charges with minimum mandatory sentences. The amount of medication Appellant was under, the trial court's failure to inquire as to Appellant's mental capacity, and Appellant's demeanor during the hearing, all evince that Appellant was unable to enter a

knowing and voluntary plea. Nothing to the contrary appears.[1]

Because Appellant was under the influence of multiple prescription medications that significantly affected her cognitive abilities, and the court did not ensure that

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[1] The State has argued, and will likely argue again, that Appellant's Statement in Advance of Plea - in which appears the statement that the signing defendant was not under the influence of anything that would impair judgment, and that the defendant believes themselves to be of sound mind and is free of anything that would prevent the defendant from understanding what they are doing and from knowingly, intelligently, and voluntarily entering the plea - is evidence of Appellant's competence. (Civ. R. 77). The State's argument, however, rests on a faulty premise. A defendant who is not capable of entering a knowing, intelligent and voluntary plea is just as incapable of reading and signing a document that says as much. The signed statement is simply insufficient to prove Appellant's competence. *State v. Pharris*, 798 P.2d 772, 777 (Utah Ct. App. 1990) (affidavit alone is insufficient to ensure that the defendant's constitutional rights are protected); *Gibbons*, 740 P.2d at 1313-14 (same; after reviewing affidavit, court should then question the defendant about it and determine whether the requirements are met). Accordingly, Appellant's statement is not sufficient evidence of her competency or ability to enter a knowing and voluntary plea.

Appellant was able to enter a knowing and voluntary plea, Appellant's plea was not knowingly and voluntarily entered. Accordingly, it was taken in violation of the Constitution. Under such circumstances, the interests of justice outweigh the untimely filing of Appellant's petition and post-conviction relief should be granted.

B. The Untimely Filing Should Be Waived In the Interest of Justice Because Appellant Received Ineffective Assistance of Counsel, Which Also Warrants Post-conviction Relief.

The Sixth Amendment to the United States Constitution and article 1, section 12 of the Utah Constitution guarantee criminal defendants the right to have assistance of counsel in defending all claims asserted against them in a court of law. The constitutional right to counsel has been recognized by the Supreme Court as "the right to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, n.14, 90 S.Ct. 1441, 1449 n.14, 25 L.Ed.2d 763 (1970); *State v. McNicol*, 554 P.2d 203, 204 (Utah 1976)(holding that defendant "is entitled to the assistance of a competent member of the Bar, who shows a willingness to identify himself with the interests of the accused and present such defenses as are available under the law and consistent with the ethics of the profession."). Because the right of an accused to be represented is "by far the most pervasive ...[of] all the rights that an accused person has,.. [the] gravity of a claim of ineffective assistance of counsel cannot be overstated." *Smith v. Mullin*, 379 F.3d 919, 929 (10th Cir. 2004)(citing *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986)).

The Supreme Court has established a two-pronged test to help determine whether a convicted Defendant has received ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Templin*, 805 P.2d 182, 186 (Utah 1990)(holding that in determining whether a criminal defendant, by reason of the performance of their counsel, has been denied their Sixth Amendment right to counsel, this court has followed the United States Supreme Court two part test). To demonstrate ineffective assistance of counsel, a defendant must first "show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, 466 U.S. at 687. The defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness" which is determined by examining the prevailing professional norms. *Id.* at 688; *State v. Simmons*, 2000 UT App 190, ¶ 4, 5 P.3d 1228. The Court must take care to "eliminate the distorting effects of hindsight, [and] to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

Under the second prong of the test, a defendant "must show that the deficient performance prejudiced the defense." *Id.* The defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different" *Id.* at 694. Upon proving both prongs of the above test, it can be said that the defendant's conviction "resulted from a breakdown in the adversary process that render[ed] the results unreliable." *Id.* In *State v. Huggins*, 920 P.2d 1195 (Utah Ct. App. 1996), the Court recognized that the two-pronged analysis was not to be "applied as a mechanical test," but was instead meant to help "answer the ultimate questions of whether the defendant received a fair trial." *Id.* at 1198 (quoting *State v. Frame*, 723 P.2d 401, 405 (Utah 1986)).

Here, Appellant's trial counsel's performance was deficient and fell below the objective standard of reasonableness. This deficient performance also prejudiced Appellant, and absent the deficiency, there is a reasonable probability that the end result would have been different, and more favorable to Appellant. Accordingly, the ineffective assistance of counsel that prejudiced Appellant requires waiving the untimely filing and granting post-conviction relief.

1. Appellant's Trial Counsel Rendered Deficient Performance Which Fell Below an Objective Standard of Reasonable Professional Judgment.

The first prong of a claim of ineffective assistance of counsel is that counsel's performance fell below an objectively reasonable standard. *Strickland*, 466 U.S. at 687. To prevail on this first prong, the defendant must overcome a strong presumption that counsel's performance was adequate, and must identify "specific acts or omissions

demonstrating that counsel's representation failed to meet an objective standard of reasonableness." *Moench v. State*, 2004 UT App 57, 88 P.3d 353 (citing *Taylor v. Warden*, 905 P.2d 277, 282 (Utah 1995)). A court may find deficient performance when counsel's actions were "completely unreasonable, not merely wrong." *Boyd v. Ward*, 179 F.3d 904, 914 (10th Cir. 1999). The defendant must overcome the presumption that the challenged actions are sound trial strategy, and the court must scrutinize whether counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690; *State v. Pecht*, 2002 UT 41, ¶ 41. A court will give counsel "wide latitude to make tactical decisions and will not question such decisions unless we find no reasonable basis for them." *Moench,* 2004 UT App at ¶ 21 (citing *Taylor*, 905 P.2d at 282).

The Supreme Court, among numerous other courts, has held that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Rodriguez v. United States*, 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed.2d 340 (1969); *Mancil v. State*, 682 So.2d 501, 502 (Ala. Cr. App. 1996)("[f]ailure to file timely appeal to this court is a classic example of ineffective assistance of counsel."); *Henderson v. State*, 643 S.W.2d 107, 108-09 (Ark. 1982)("the failure of counsel to perfect an appeal in a criminal case where the defendant desires an appeal amounts to a denial of the defendant's right to effective assistance of counsel.");

State v. Wicker, 20 P.3d 1007 (Wash. App. 2001)("it is well-recognized that an attorney's failure to file a requested notice of appeal is 'professionally unreasonable.'"). Further, counsel's failure to initiate an appeal upon request from the client "cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes." *Roe v. Flores-Ortega*, 528 U.S. 470, 477, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). Additionally, "no prejudice need be shown when ineffective assistance of counsel consists of an attorney's failure to preserve the right of a client to appeal."*Broeckel v. State*, 900 P.2d 1205, 1208 (Alaska Ct. App. 1995); *Castellanos v. United States*, 26 F.3d 717, 719 (7th Cir. 1994); *United States v. Peak*, 992 F.2d 39, 42 (4th Cir. 1993); *United States v. Horodner*, 993 F.2d 191, 195 (9th Cir. 1993); *Bonneau v. United States*, 961 F.2d 17, 23 (1st Cir. 1992); *United States v. Davis*, 929 F.2d 554, 557 (10th Cir. 1991); *Williams v. Lockhart*, 849 F.2d 1134, 1137 n.3 (8th Cir. 1988). The "complete denial of counsel during a critical stage of a judicial proceeding, ... mandates a presumption of prejudice because 'the adversary process itself' has been rendered 'presumptively unreliable.'" *Flores-Ortega*, 528 U.S. at 477 (citing *United States v. Cronic*, 466 U.S. 648, 659 (1984)).

In *Boggess v. Morris*, the Court found that where a defendant had been denied the right to appeal, he had been denied a constitutional right that warranted post-conviction relief. 635 P.2d 39, 42-43 (Utah 1981). There, the defendant was convicted of

manslaughter and sentenced to jail. *Id.* at 40. Although he had previously informed his appointed counsel that he did not want to appeal, upon entering prison he decided that he did want to appeal and notified his counsel. *Id.* Counsel failed to file a notice of appeal, believing his representation to have terminated at sentencing. *Id.* The defendant then filed a notice of appeal nearly seven months late. *Id.* The Court first found that "counsel erred in not filing the notice of appeal in this case. Unless relieved by the court, appointed counsel is responsible to continue his or her representation through appeal if the defendant requests an appeal..." *Id.* The Court then found that a "timely appeal ...was prevented by circumstances that admittedly constituted a denial of defendant's constitutional rights to appeal," and issued a writ of cert for direct review. *Id.* at 43.

Similarly, in *State v. Johnson*, the Court found that where a defendant had been denied the right to appeal, post-conviction relief was warranted under Rule 65B(i) of the Utah Rules of Civil Procedure. 635 P.2d 36 (Utah 1981). There, the defendant requested that his trial counsel file a notice of appeal, but trial counsel failed to. *Id.* at 37. The defendant then contacted new counsel within the thirty-day period, and that counsel also failed to file a notice of appeal. *Id.* The Court found that if "within the statutory period for appeal defendant requested counsel to take an appeal and counsel gave defendant reason to believe that he would but then failed to do so, defendant was denied a constitutional right." *Id.* at 38. Because the defendant was denied his constitutional right to appeal, a

motion for post-conviction relief was the proper remedy. *Id.* at 38.

Additionally, the failure to file timely motions that may benefit the defendant can form the basis of a claim of ineffective assistance of counsel. In *State v. Snyder*, trial counsel failed to file a timely motion to suppress the defendant's videotaped interview during which incriminatory and embarrassing statements were made. 860 P.2d 351 (Utah Ct. App. 1993). The Court stated that counsel's failure to meet a filing deadline could not be excused as sound trial strategy or tactic. *Id.* at 359. Thus, the court found counsel's failure to adhere to deadlines "outside the wide range of professionally competent assistance" and his performance "objectively deficient." *Id.* (citing *Frame*, 723 P.2d at 405). The case was reversed and remanded. *Id.* at 361. *See also State v. Nelson*, 2004 UT App 421 (memo. decision)(failure to timely file notice of alibi constituted ineffective assistance of counsel); *Wallace v. State*, 121 S.W.3d 652, 657 (Tenn. 2003)(counsel's failure to file a timely motion for new trial was deficient).

In this case, trial counsel made several errors that cannot be found to be reasonable strategy or within the bounds of professionally competent assistance. First, and most importantly, trial counsel failed to file a notice of appeal - timely or not - even after being specifically requested to by Appellant. (Civil R. 113). Beyond this initial instruction, Appellant wrote to her trial counsel several times during the thirty day period, making similar requests, but heard nothing back. *Id.* Further, when trial counsel finally visited

Appellant in prison several months later, she again told him she wanted to appeal, and he indicated she had one year to do so, and he was handling it. *Id.* Trial counsel repeatedly told Appellant - at least three times - that he was handling her appeal, (Civil R. 113), even when he knew that no appeal was proceeding, and knew or should have known that an appeal was no longer procedurally possible. Trial counsel's failure to file an appeal cannot be considered sound strategy, was in blatant disregard to specific instructions from Appellant, is professionally unreasonable, and clearly deficient. Furthermore, the fact that he failed to continue representing Appellant after sentencing - as required by *Boggess* - is even clearer evidence of ineffective assistance of counsel, as Appellant had *no* assistance of counsel during her attempted appeal.

Trial counsel also failed to file a motion to withdraw Appellant's guilty pleas. Although Appellant did not specifically request such a motion, she clearly indicated to trial counsel that she was unhappy with the outcome at sentencing, and wanted to do something about it. (Civil R. 113). Again though, trial counsel failed to adhere to his client's wishes, and missed a procedural deadline. As the Supreme Court stated, such failure "reflects inattention to the defendant's wishes" and is deficient. *Flores-Ortega*, 528 U.S. at 477.

Additionally, trial counsel failed to file a motion for a competency hearing or to continue the plea, despite indication that Appellant could not enter a knowing and

voluntary plea. Also, trial counsel was deficient in allowing Appellant to enter a plea when she was clearly incapable of entering a knowing and voluntary plea. Appellant's demeanor at the plea hearing, her history of prescription drug use, and counsel's knowledge of her use of prescription medication all point to the fact that trial counsel should have at least questioned whether Appellant could enter a knowing and voluntary plea. Further, even if trial counsel was not actually aware of Appellant's mental state, he clearly *should* have been. Trial counsel represented to the trial court that Appellant was competent, and signed a certificate stating as much. (Crim. R. 23). In doing so, he was required to ascertain whether Appellant actually was competent to enter her pleas, before representing to the court that she was. The argument is made by the State that counsel would have no reason to suspect incompetency unless specifically told of such by his client. (Civil R. 72). However, it is absurd to expect a client who is not competent to make a knowing and voluntary plea to have the presence of mind to inform her attorney of the medications she is on so that counsel can assess her competency, especially when never questioned about them by either counsel or the trial court. If an individual is not competent to enter a guilty plea, that determination must be made in the first instance by her counsel after questioning of his client. In short, if counsel plans on certifying something to the court - here, that Appellant was competent - he is expected to make a reasonable inquiry as to whether the facts underlying the certification are actually true.

The burden to assess competency is upon counsel, not the client. Where counsel fails to ask even the most basic questions as to whether the client can enter a knowing and voluntary plea, but nonetheless certifies that the client is competent, such actions are deficient. Here, trial counsel was deficient in failing to request a competency hearing when he knew or should have known Appellant was not competent, and if he didn't know of her inability to enter a knowing and voluntary plea, then in failing to converse with his client sufficient to know that she was incompetent before signing the certificate of defense counsel.

These errors - individually or in combination - were deficient on the part of trial counsel. The failure to file a timely appeal, the blatant disregard of Appellant's requests, failure to file a motion to withdraw guilty plea, failure to request a competency hearing, and failure to assess his client's competency before certifying it all indicate a clear deficiency in trial counsel's performance, which fell far below an objective standard of professional reasonableness. Accordingly, Appellant has satisfied the first prong of *Strickland.*

2. Appellant Was Prejudiced By Trial Counsel's Deficient Performance.

In order to satisfy the second prong of *Strickland,* a defendant must show that absent counsel's deficient performance, there is a reasonable likelihood that the results

would have been different. *Strickland*, 466 U.S. at 694; *Moench*, 2004 UT App 57 (citing *Taylor*, 905 P.2d at 282). A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Carter*, 2001 UT at ¶ 31 (quoting *Strickland*, 466 U.S. at 694). Prejudice is presumed to exist when counsel fails to file an appeal after being requested to do so, and need not be shown by the defendant. *Broeckel*, 900 P.2d at 1208; *Castellanos,* 26 F.3d at 719; *Peak*, 992 F.2d at 42; *Horodner*, 993 F.2d at 195; *Bonneau,* 961 F.2d at 23; *Davis*, 929 F.2d at 557; *Williams,* 849 F.2d at 1137 n. 3. However, to show prejudice in counsel's failure to file a motion to withdraw a guilty plea, the defendant must show there is a reasonable probability that the court would have granted the motion. *State v. Munson*, 972 P.2d 418, 422 (Utah 1998). A guilty plea can only be withdrawn for good cause, such as when the defendant can show that the plea was not entered knowingly and voluntarily. *Id.*

Here, prejudice is presumed because trial counsel failed to file a timely notice of appeal. *See Flores-Ortega*, 528 U.S. at 477; *Davis*, 929 F.2d at 557. Appellant has therefore satisfied the second prong of *Strickland*, and proven that she received ineffective assistance of counsel. Nothing more needs be shown. However, Appellant was also prejudiced by counsel's failure to file other motions, and failure to assess her capability to enter a knowing and voluntary plea. First, had trial counsel filed a motion to withdraw the guilty pleas, the motion would likely have been granted as the plea was

involuntarily and unknowingly entered. There is a reasonable likelihood that absent counsel's deficient performance, the pleas would have been withdrawn, and Appellant would either not have spent the last three years in prison, or would at least be facing less time than her current sentences. Additionally, Appellant was prejudiced when trial counsel failed to request a competency hearing and failed to assess her competency prior to allowing her to enter guilty pleas and to certifying her ability to enter a knowing and voluntary plea. Again, had trial counsel acted with professional diligence in this case, Appellant would likely not have spent the last three years in prison, or at least would be facing a less lengthy sentence. At the very least, had trial counsel decided he could not continue representing counsel, and had either informed her of this decision or filed a motion to withdraw, Appellant would have had notice such that she could and should look for and retain new counsel within the prescribed time period. Appellant then could have filed timely motions, a timely appeal, or a timely petition for post-conviction relief.[2] However, trial counsel not only failed to represent Appellant, he failed to inform her of this, and further prejudiced her in denying her the opportunity to find someone who

[2]Current counsel notes that had Appellant been informed of trial counsel's intention to stop representing her, and Appellant been able to immediately seek new counsel following her sentencing, a petition for post-conviction relief could have been timely filed. Appellant retained current counsel in October 2003, and a petition was filed just over six months later in May 2004. Because a defendant has one year in which to file a petition for post-conviction relief, the six months counsel took to interview, research, assess and draft a petition would be well within the statutory time limit.

would zealously represent her. Accordingly, Appellant was prejudiced by all of trial counsel's deficient actions, or lack of actions, and received ineffective assistance of counsel. This ineffective assistance of counsel is grave enough to both waive the untimely filing of her petition in the interests of justice, and to grant post-conviction relief as requested.

CONCLUSION

The trial court erred in granting Appellee's Motion to Dismiss Appellant's Petition for Post-Conviction Relief. While Appellant's Petition was untimely filed, this Court should waive the untimely filing because the interests of justice so require. Further, these interests of justice - assuring knowingly and voluntarily entered pleas and effective assistance of counsel - warrant post-conviction relief, and this Court should reverse Appellant's convictions.

DATED this 21 day of June 2005.

SKORDAS, CASTON & MORGAN

Jack M. Morgan, Jr.
Tiffany L. Johnson

CERTIFICATE OF SERVICE

I hereby certify that on this 24 day of June 2005, I did cause a true and correct copy of the foregoing **BRIEF OF APPELLANT** to be mailed, by First Class U.S. Mail, postage prepaid, or did cause to be hand-delivered or transmitted via facsimile, to the following:

Erin Riley
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Jennifer Morgan
Skordas, Caston & Morgan

ADDENDUM A

Rule 65B. Extraordinary relief.

(a) Availability of remedy. Where no other plain, speedy and adequate remedy is available, a person may petition the court for extraordinary relief on any of the grounds set forth in paragraph (b) (involving wrongful restraint on personal liberty), paragraph (c) (involving the wrongful use of public or corporate authority) or paragraph (d) (involving the wrongful use of judicial authority, the failure to exercise such authority, and actions by the Board of Pardons and Parole). There shall be no special form of writ. Except for instances governed by Rule 65C, the procedures in this rule shall govern proceedings on all petitions for extraordinary relief. To the extent that this rule does not provide special procedures, proceedings on petitions for extraordinary relief shall be governed by the procedures set forth elsewhere in these rules.

(b) Wrongful restraints on personal liberty.

(1) Scope. Except for instances governed by Rule 65C, this paragraph shall govern all petitions claiming that a person has been wrongfully restrained of personal liberty, and the court may grant relief appropriate under this paragraph.

(2) Commencement. The proceeding shall be commenced by filing a petition with the clerk of the court in the district in which the petitioner is restrained or the respondent resides or in which the alleged restraint is occurring.

(3) Contents of the petition and attachments. The petition shall contain a short, plain statement of the facts on the basis of which the petitioner seeks relief. It shall identify the respondent and the place where the person is restrained. It shall state the cause or pretense of the restraint, if known by the petitioner. It shall state whether the legality of the restraint has already been adjudicated in a prior proceeding and, if so, the reasons for the denial of relief in the prior proceeding. The petitioner shall attach to the petition any legal process available to the petitioner that resulted in restraint. The petitioner shall also attach to the petition a copy of the pleadings filed by the petitioner in any prior proceeding that adjudicated the legality of the restraint.

(4) Memorandum of authorities. The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(5) Dismissal of frivolous claims. On review of the petition, if it is apparent to the court that the legality of the restraint has already been adjudicated in a prior proceeding, or if for any other reason any claim in the petition shall appear frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating that the claim is frivolous on its face and the reasons for this conclusion. The order need not state findings of fact or conclusions of law. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal.

(6) Responsive pleadings. If the petition is not dismissed as being frivolous on its face, the court shall direct the clerk of the court to serve a copy of the petition and a copy of any memorandum upon the respondent by mail. At the same time, the court may issue an order directing the respondent to answer or otherwise respond to the petition, specifying a time within which the respondent must comply. If the circumstances require, the court may also issue an order directing the respondent to appear before the court for a hearing on the legality of the restraint. An answer to a petition shall state plainly whether the respondent has restrained the person alleged to have been restrained, whether the person so restrained has been transferred to any other person, and if so, the identity of the transferee, the date of the transfer, and the reason or authority for the transfer. Nothing in this paragraph shall be construed to prohibit the court from ruling upon the petition based upon a dispositive motion.

(7) Temporary relief. If it appears that the person alleged to be restrained will be removed from the court's jurisdiction or will suffer irreparable injury before compliance with the hearing order can be enforced, the court shall issue a warrant directing the sheriff to bring the respondent before the court to be dealt with according to law. Pending a determination of the petition, the court may place the person alleged to have been restrained in the custody of such other persons as may be appropriate.

(8) Alternative service of the hearing order. If the respondent cannot be found, or if it appears that a person other than the respondent has custody of the person alleged to be restrained, the hearing order and any other process issued by the court may be served on the person having custody in the manner and with the same effect as if that person had been named as respondent in the action.

(9) Avoidance of service by respondent. If anyone having custody of the person alleged to be restrained avoids service of the hearing order or attempts wrongfully to remove the person from the court's jurisdiction, the sheriff shall immediately arrest the responsible person. The sheriff shall forthwith bring the person arrested before the court to be dealt with according to law.

(10) Hearing or other proceedings. In the event that the court orders a hearing, the court shall hear the matter in a summary fashion and shall render judgment accordingly. The respondent or other person having custody shall appear with the person alleged to be restrained or shall state the reasons for failing to do so. The court may nevertheless direct the respondent to bring before it the person alleged to be restrained. If the petitioner waives the right to be present at the hearing, the court shall modify the hearing order accordingly. The hearing order shall not be disobeyed for any defect of form or any misdescription in the order or the petition, if enough is stated to impart the meaning and

intent of the proceeding to the respondent.

(c) Wrongful use of or failure to exercise public authority.

(1) Who may petition the court; security. The attorney general may, and when directed to do so by the governor shall, petition the court for relief on the grounds enumerated in this paragraph. Any person who is not required to be represented by the attorney general and who is aggrieved or threatened by one of the acts enumerated in subparagraph (2) of this paragraph may petition the court under this paragraph if (A) the person claims to be entitled to an office unlawfully held by another or (B) if the attorney general fails to file a petition under this paragraph after receiving notice of the person's claim. A petition filed by a person other than the attorney general under this paragraph shall be brought in the name of the petitioner, and the petition shall be accompanied by an undertaking with sufficient sureties to pay any judgment for costs and damages that may be recovered against the petitioner in the proceeding. The sureties shall be in the form for bonds on appeal provided for in Rule 73.

(2) Grounds for relief. Appropriate relief may be granted: (A) where a person usurps, intrudes into, or unlawfully holds or exercises a public office, whether civil or military, a franchise, or an office in a corporation created by the authority of the state of Utah; (B) where a public officer does or permits any act that results in a forfeiture of the office; (C) where persons act as a corporation in the state of Utah without being legally incorporated; (D) where any corporation has violated the laws of the state of Utah relating to the creation, alteration or renewal of corporations; or (E) where any corporation has forfeited or misused its corporate rights, privileges or franchises.

(3) Proceedings on the petition. On the filing of a petition, the court may require that notice be given to adverse parties before issuing a hearing order, or may issue a hearing order requiring the adverse party to appear at the hearing on the merits. The court may also grant temporary relief in accordance with the terms of Rule 65A.

(d) Wrongful use of judicial authority or failure to comply with duty; actions by board of pardons and parole.

(1) Who may petition. A person aggrieved or whose interests are threatened by any of the acts enumerated in this paragraph may petition the court for relief.

(2) Grounds for relief. Appropriate relief may be granted: (A) where an inferior court, administrative agency, or officer exercising judicial functions has exceeded its jurisdiction or abused its discretion; (B) where an inferior court, administrative agency, corporation or person has failed to perform an act required by law as a duty of office, trust or station; (C) where an inferior court, administrative agency, corporation or person has refused the petitioner the use or enjoyment of a right or office to which the petitioner is entitled; or (D) where the Board of Pardons and Parole has exceeded its jurisdiction or failed to perform an act required by constitutional or statutory law.

(3) Proceedings on the petition. On the filing of a petition, the court may require that notice be given to adverse parties before issuing a hearing order, or may issue a hearing order requiring the adverse party to appear at the hearing on the merits. The court may direct the inferior court, administrative agency, officer, corporation or other person named as respondent to deliver to the court a transcript or other record of the proceedings. The court may also grant temporary relief in accordance with the terms of Rule 65A.

(4) Scope of review. Where the challenged proceedings are judicial in nature, the court's review shall not extend further than to determine whether the respondent has regularly pursued its authority.

ADVISORY COMMITTEE NOTE

ADDENDUM B

Rule 11. Pleas.

(a) Upon arraignment, except for an infraction, a defendant shall be represented by counsel, unless the defendant waives counsel in open court. The defendant shall not be required to plead until the defendant has had a reasonable time to confer with counsel.

(b) A defendant may plead not guilty, guilty, no contest, not guilty by reason of insanity, or guilty and mentally ill. A defendant may plead in the alternative not guilty or not guilty by reason of insanity. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(c) A defendant may plead no contest only with the consent of the court.

(d) When a defendant enters a plea of not guilty, the case shall forthwith be set for trial. A defendant unable to make bail shall be given a preference for an early trial. In cases other than felonies the court shall advise the defendant, or counsel, of the requirements for making a written demand for a jury trial.

(e) The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:

(e)(1) if the defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel;

(e)(2) the plea is voluntarily made;

(e)(3) the defendant knows of the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, these rights are waived;

(e)(4)(A) the defendant understands the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements;

(e)(4)(B) there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged crime was actually committed by the defendant or, if the defendant refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish a substantial risk of conviction;

(e)(5) the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences;

(e)(6) if the tendered plea is a result of a prior plea discussion and plea agreement, and if so, what agreement has been reached;

(e)(7) the defendant has been advised of the time limits for filing any motion to withdraw the plea; and

(e)(8) the defendant has been advised that the right of appeal is limited.

These findings may be based on questioning of the defendant on the record or, if used, a written statement reciting these factors after the court has established that the defendant has read, understood, and acknowledged the contents of the statement. If the defendant cannot understand the English language, it will be sufficient that the statement has been read or translated to the defendant.

Unless specifically required by statute or rule, a court is not required to inquire into or advise concerning any collateral consequences of a plea.

(f) Failure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty, no contest or guilty and mentally ill is not a ground for setting the plea aside, but may be the ground for extending the time to make a motion under Section 77-13-6.

(g)(1) If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the agreement shall be approved by the court.

(g)(2) If sentencing recommendations are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

(h)(1) The judge shall not participate in plea discussions prior to any plea agreement being made by the prosecuting attorney.

(h)(2) When a tentative plea agreement has been reached, the judge, upon request of the parties, may permit the disclosure of the tentative agreement and the reasons for it, in advance of the time for tender of the plea The judge may then indicate to the prosecuting attorney and defense counsel whether the proposed disposition will be approved

(h)(3) If the judge then decides that final disposition should not be in conformity with the plea agreement, the judge shall advise the defendant and then call upon the defendant to either affirm or withdraw the plea

(i) With approval of the court and the consent of the prosecution, a defendant may enter a conditional plea of guilty, guilty and mentally ill, or no contest, reserving in the record the right, on appeal from the judgment, to a review of the adverse determination of any specified pre-trial motion A defendant who prevails on appeal shall be allowed to withdraw the plea

(j) When a defendant tenders a plea of guilty and mentally ill, in addition to the other requirements of this rule, the court shall hold a hearing within a reasonable time to determine if the defendant is mentally ill in accordance with Utah Code Ann § 77-16a-103

(k) Compliance with this rule shall be determined by examining the record as a whole Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded Failure to comply with this rule is not, by itself, sufficient grounds for a collateral attack on a guilty plea

ADVISORY COMMITTEE NOTE

ADDENDUM C

78-35a-102. Replacement of prior remedies.

(1) This chapter establishes a substantive legal remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies, including a direct appeal except as provided in Subsection (2). Procedural provisions for filing and commencement of a petition are found in Rule 65C, Utah Rules of Civil Procedure.

(2) This chapter does not apply to:

(a) habeas corpus petitions that do not challenge a conviction or sentence for a criminal offense;

(b) motions to correct a sentence pursuant to Rule 22(e), Utah Rules of Criminal Procedure; or

(c) actions taken by the Board of Pardons and Parole.

Enacted by Chapter 235, 1996 General Session
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Last revised: Monday, May 16, 2005

ADDENDUM D

78-35a-104. Grounds for relief -- Retroactivity of rule.

(1) Unless precluded by Section **78-35a-106** or **78-35a-107**, a person who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence upon the following grounds:

(a) the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution;

(b) the conviction was obtained under a statute that is in violation of the United States Constitution or Utah Constitution, or the conduct for which the petitioner was prosecuted is constitutionally protected;

(c) the sentence was imposed in an unlawful manner, or probation was revoked in an unlawful manner;

(d) the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution; or

(e) newly discovered material evidence exists that requires the court to vacate the conviction or sentence, because:

(i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence;

(ii) the material evidence is not merely cumulative of evidence that was known;

(iii) the material evidence is not merely impeachment evidence; and

(iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received.

(2) The question of whether a petitioner is entitled to the benefit of a rule announced by the United States Supreme Court, Utah Supreme Court, or Utah Court of Appeals after the petitioner's conviction became final shall be governed by applicable state and federal principles of retroactivity.

Enacted by Chapter 235, 1996 General Session
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Last revised: Monday, May 16, 2005

ADDENDUM E

78-35a-107. Statute of limitations for postconviction relief.

(1) A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued.

(2) For purposes of this section, the cause of action accrues on the latest of the following dates:

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;

(b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;

(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;

(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed; or

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based.

(3) If the court finds that the interests of justice require, a court may excuse a petitioner's failure to file within the time limitations.

(4) Sections **77-19-8**, **78-12-35**, and **78-12-40** do not extend the limitations period established in this section.

Amended by Chapter 139, 2004 General Session
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Last revised: Monday, May 16, 2005

ADDENDUM F

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence

ADDENDUM G

Article I, Section 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

No History for Constitution
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Last revised: Tuesday, December 21, 2004

ADDENDUM H

IN THE FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

COPY

STATE OF UTAH,

Plaintiff,

vs.

TAMMY BLUEMEL,

Defendant.

Case No. 011505069

Arraignment
Electronically Recorded on
December 5, 2001

BEFORE: THE HONORABLE GUY BURNINGHAM
Fourth District Court Judge

APPEARANCES

For the State:

David Sturgill
UTAH COUNTY ATTORNEY'S OFFICE
100 East Center Street
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Provo, Utah 84606
Telephone: (801)370-8026

For the Defendant:

Victor Lawrence
LEXINGTON & LAWRENCE
634 South 400 West
Suite 200
Salt Lake City, Utah 84101
Telephone: (801)297-2480

Transcribed by: Beverly Lowe, CSR/CCT

PROCEEDINGS

(Electronically recorded on January 5, 2001)

MR. LAWRENCE: Your Honor, can we call No. 4145, I believe, Tammy Bluemel.

THE COURT: Tammy Bluemel. The first matter is set for arraignment, entry of plea. Are we ready to proceed on that?

MR. LAWRENCE: We are, your Honor. The prosecutor (inaudible) is Mr. Sturgill. He's not in the courtroom right now. He has signed the statement of defendant in support of a guilty plea.

THE COURT: Okay.

MR. LAWRENCE: Do you want to proceed on that or do you want to --

THE COURT: Is the State okay with that?

FEMALE PROSECUTOR: That's fine.

THE COURT: Okay. If you'd tell me what that agreement is.

MR. LAWRENCE: Your Honor, it's my understanding that the State has amended the counts, and my client will plead guilty to three counts of rape and one count of supplying alcohol to a minor.

THE COURT: Okay. So do you want to just do Counts I, II and III?

MR. LAWRENCE: That would be fine, your Honor.

FEMALE PROSECUTOR: And Count VIII.

THE COURT: And Count VIII, all right. Ms. Bluemel, each of the three counts of rape are first-degree felonies, and each carry a maximum sentence of not less than five years and maybe for the rest of your life in prison, and a fine of up to $10,000. The Class A misdemeanor carries a maximum sentence of up to a year incarceration and a maximum fine of up to $2,500.

Before I can accept your pleas, you have certain Constitutional Rights that you need to waive. They are talked about in that statement in advance of plea. Do you have any questions about the statement?

MS. BLUEMEL: I don't, your Honor.

THE COURT: Do you understand each of your rights? You have a right to a speedy trial, a right to a trial by jury, a right to confront and cross examine the witnesses against you. You have a right not to incriminate yourself; you don't have to take the witness stand and testify. In fact, you don't have to prove or disprove anything. The burden of proof is upon the State to prove each and every element of the crimes that are alleged. Do you understand that?

MS. BLUEMEL: I do, your Honor.

THE COURT: And do you waive those rights?

MS. BLUEMEL: I do.

THE COURT: Do you have the factual basis for the charges?

FEMALE PROSECUTOR: Yes, your Honor. On or between

October 1999 and April of 1999 in Lehi, Utah, this individual had sexual intercourse with the 14-year-old victim on at least three separate occasions, and she also supplied alcohol to this individual.

THE COURT: Okay. Are those facts true?

MS. BLUEMEL: Yes, your Honor.

MR. LAWRENCE: Just a clarification. The alcohol was provided on one occasion, your Honor.

THE COURT: Right, on -- oh, okay -- one occasion. Do you understand that if you wish to withdraw these pleas you need to make a motion in writing to do that within 30 days of sentencing. The Court would not automatically grant that motion, only if there were some good cause. Do you understand that?

MS. BLUEMEL: I do.

THE COURT: So if you do intend to plea, then let's have you sign the statement. Once she signs that, Mr. Lawrence, you may approach.

(Defendant signing statement)

THE COURT: I'll also add my signature to it.

Ms. Bluemel, to Count I, rape, a first-degree felony, what is your plea?

MS. BLUEMEL: Guilty.

THE COURT: Count II, rape, a first-degree felony, what is your plea?

MS. BLUEMEL: Guilty.

THE COURT: And Count III, rape, a first-degree felony, what is your plea?

MS. BLUEMEL: Guilty.

THE COURT: And to Count VIII, supplying alcohol to a minor, a Class A misdemeanor, what is your plea?

MS. BLUEMEL: Guilty, your Honor.

THE COURT: Pleas of guilty are received and accepted by the Court. I find Ms. Bluemel has knowingly and voluntarily entered her pleas, and pursuant to the agreement, Counts IV, V, VI and VII are dismissed.

The law required that sentence be imposed in not less than 2 nor more than 45 days. I am going to refer the matter to Adult Probation and Parole for a presentence report and their recommendation. Sentencing will be January 16th at 9 a.m. if that's convenient with everyone's calendar.

MR. LAWRENCE: January 16th at what time, Judge?

THE COURT: At 9 a.m.

MR. LAWRENCE: That will be fine.

THE COURT: Get in touch with AP&P, Ms. Bluemel, today. They'll prepare a presentence report and a recommendation. Your attorney will receive a copy of that before the 16th, and review that with you. Then you be back here at 9 o'clock on January 16th. Actually that will be in courtroom 402, right next door.

Now, on the other matter I'm wondering if we should --

MR. LAWRENCE: There is some confusion, Judge, if I can interject.

THE COURT: Yes.

MR. LAWRENCE: What Mr. Sturgill and I had agreed to last time, and I was not real clear when you stated it, we had asked the Court to defer sanctions on the probation violation until we get the sentencing report.

THE COURT: Let me continue the sanctions also until January 16th at 9 a.m.

MR. LAWRENCE: That would be good.

THE COURT: Okay.

MR. LAWRENCE: Thank you, Judge.

THE COURT: You're welcome.

(Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 30th day of March 2005.

My commission expires:
February 24, 2008

Beverly Lowe
NOTARY PUBLIC
Residing in Utah County

BEVERLY LOWE
Notary Public
State of Utah
My Commission Expires Feb 24, 2008
1909 S Washington Ave., Provo, UT 84606